No. 1071

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Supreme Court of the United States

OCTOBER TERM—1940.

AMERICAN-WEST AFRICAN LINE, INC.,
Petitioner,

against

JOHN A. LYDECKER, as Administrator of the Estate of John Bernard Frye,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

PAGES

Facts 1

Jurisdiction 6

Reply to Petitioner's Argument 10

CASES CITED.

Arizona v. *Anelich*, 298 U. S. 110 12

Baltimore & Carolina Line Inc. v. *Redman*, 70 Fed. (2) 635, 295 U. S. 654 15

Beebe v. *Moormack Gulf Lines*, 59 F. (2d) 319, cert. den. 287 U. S. 597 11

Brinkmeier v. *Mo. Pac. Rwy. Co.*, 224 U. S. 268 ..... 7, 8

De Luca v. *Shepard Steamship Lines*, 65 F. (2d) 566; opinion modified, 67 F. (2d) 437, cert. den. 291 U. S. 685 12

Honeyman v. *Hannan*, 300 U. S. 14 9

Israel v. *Arthur*, 152 U. S. 355 ..... 7, 8

Luckenbach S. S. Co. v. *Campbell*, 8 Fed. (2) 223 5

Lynch, et al., State Tax Com'rs, of New York v. *People of New York ex rel. Pierson*, 293 U. S. 55 9

Missouri Pacific R. R. Co. v. *Bushey*, 20 S. W. (2) 614 5

New Orleans & N. E. R. R. Co. v. *Harris*, 247 U. S. 367 10

New York Central v. *Marcone*, 281 U. S. 345 13

Panama v. *Johnson*, 289 Fed. 964, 264 U. S. 375 13

Sabine Towing Co. v. *Brennan*, 85 F. (2d) 478, cert. den. 293 U. S. 611 10

Smiley v. *Kansas*, 196 U. S. 447 ..... 7, 8

Socony-Vacuum v. *Smith*, 305 U. S. 424 15

St. Louis v. *Craft*, 237 U. S. 648 ..... 5, 6, 7

St. Louis v. *Simpson*, 286 U. S. 346 13

Warner v. *Goltra*, 293 U. S. 155 12

OTHER AUTHORITIES CITED:

PAGES

Judicial Code as amended by the Act of February 13th, 1925, Chapter 229, Sec. 1, 43 Stat. 938 [U. S. C. A. Title 28, Section 347(a)]:
Section 240(a) 6

The Jones Act (Title 46, Section 688, U. S. C. A.):
Section 33 6

Railway Employers Liability Act, Title 45, United State Code Annotated:
Sections 51 and 59 ..... 5, 10

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

This case does not present any question of the nature which this Court is accustomed to review by certiorari. There is no federal question of substance. The unanimous decisions of the three New York Courts were in accord with earlier decisions of this Court, the New York Courts and the statute under which suit was brought. No question of general interest or large public importance is presented. There are no conflicting decisions on which this Court is called upon to settle a question of law.

This case concerns only the litigants involved.

The Facts.

Frye, a seaman, was a licensed officer, in the employ of petitioner for 8 years and met his death as a result of being jammed between the end of a boom and the mast of the S. S. "Padnsay" at Port Harcourt, Nigeria, British West Africa, on February 6, 1937.

Petitioner's statement improperly and insufficiently describes the condition of the vessel and its gear; and the events of accident, etc., which necessitates a recitation of the proven facts.

At the time of the accident cargo was being discharged from #2 hatch by the use of a steam winch and booms. The heel of the jumbo boom jammed decedent between the end of the boom and the mast.

The evidence satisfactorily established the ship's unseaworthiness, the petitioner's negligence and proof of defective equipment; that the brake band was broken was admitted by Frye's superior officer, the ship's master, Captain Seay (R., 186, 187).

> "Q. Was it taken off?
>
> A. It was broken off.
>
> Q. When was it broken off.
>
> A. I do not recall just when but Mr. Frye reported that a wire had broken the brake band on both the starboard No. 2 winch and the port No. 1 winch" (R., 186).
>
> "Q. The report by Mr. Frye that there were two bands broken by wires?
>
> A. The report was given to me on the way down the coast" (R., 187).

These repairs could and should have been made at Lagos before the vessel arrived at the port where Mr. Frye was injured, but were not (R., 186).. The repairs could also have been made by the chief engineer of the vessel—the officer who witnesses for both sides testified is charged with that duty, not the chief officer, Frye, as asserted by petitioner (R., 124, 125, 290, 309). It was his, the chief engineer's duty to make repairs to machinery and to keep the winches and brakes in order. This was admitted by two of petitioner's witnesses (R., 290 and 309). Captain Seay was superior to the chief engineer and of Frye (R.,

187). The chief engineer, in petitioner's employ for 10 years (R., 233) said:

"Q. As chief engineer of the 'Padnsey' what are your duties?

A. To keep all machinery attached to the vessel in good condition" (R., 234).

"Q. You have general supervision of all machinery and boilers and the engine-room and—

A. Deck machinery.

Q. And there is only one person over you, the captain?

A. Yes" (R., 235).

This testimony destroys petitioner's assertion that Frye was in charge of the machinery and solely responsible for the accident.

The kroo boys and winchmen, who were Frye's fellow servants ran away when the boom began to fall without shutting off the steam or otherwise assisting Frye (R., 318) and this was certainly negligence within the meaning of the Jones Act.

Petitioner claims that decedent ordered the shifting of gears, and argues that this was the sole cause of the accident. Three eye witnesses testified they heard no such order nor did they hear any alleged confession to that effect (R., 40, 69, 85, 320, 321). The 2nd mate, who saw the accident and only 10 feet away from Frye, said the purported confession originated with the captain (R., 320).

"Q. Did you, as a matter of fact, hear Frye give any order to shift gears just before the boom fell?

A. No, sir.

Q. Did he give you any such order within your hearing?

A. No.

Q. You are sure?

A. Yes, sir" (R., 321).

The captain experienced in testifying, on behalf of petitioner in negligence actions (R., 223), had also "interviewed seamen concerning accidents on other occasions" (R., 223). He had been in petitioner's employ for 12 years and was still in its employ when he testified (R., 184), and he admitted Frye "was a careful man" (R. 225), "a good officer in every way" (R., 206).

Frye still alive when he was taken off the vessel (R., 86), was conscious (R., 247, 271) while in hospital, made this request to Captain Seay:

> "I want you to tell my sister to take care of the baby. He spoke of his niece always as the baby" (R., 191).

The award herein made was for this girl, for whom this action was brought.

As to the item of damages the evidence is uncontradicted that decedent was single (R., 399), left surviving this orphaned niece whom he had supported since she was 3 years old and with petitioner's knowledge for at least eight years, the funds for her support having been by an allotment made directly by petitioner from decedent's wages. Checks still in its possession at the time of trial, were sent to the custodians of the child by it (R., 296). Decedent, in addition to the $50.00 monthly allotment, gave the child clothing and spending money (R., 129). She was Frye's sole surviving dependent (R., 7, 130, 131, 399). (During these years he made no allotments to anyone else.)

Frye was 38 years of age (R., 126), and had a life expectancy of 29.62 years. His niece or "baby" as petitioner and all of the ship's crew knew, was an orphan, whose father died before she was born, and whose mother died when she was 3 years old. The contributions were consistently made, as proven by petitioner's checks. He also, at the end of

> "every trip he would buy whatever was needed in the line of clothes, and things of that sort, left money for her" (R., 129).

Decedent was very affectionate and kind to her at all times (R., 142). No other person ever made any claim except her (R., 7, 20, 21). The pleadings as well as the proof exclude the possibility of other dependents including the father and mother (R., 7, 21, 130, 131, 399). She has the undeniable right under the statute to the recovery that has been allowed her, she being

> "the next of kin dependent upon such employee" (Sec. 59, title 45, U. S. C. A.).

She is the decedent's sole surviving dependent (R., 7, 130, 131).

The first pleading made the respondent's claim known to petitioner that decedent

> "at the time of his death left surviving him a niece who was *solely* and *wholly dependent* upon him for support" (R., 7).

Respondent throughout the entire course of the litigation never changed his position. The proof given at the trial was in conformity with the pleadings.

The second cause of action was for conscious pain and suffering. The jury fixed and the Courts affirmed the award of $7,500.00. The decedent suffered excruciating pain and agony for at least three hours after he was injured (R., 86, 247, 271, 395, 396).

The award on this cause of action was made pursuant to Section 59, Title 45, U. S. C. A., and was reasonable in amount.

St. Louis v. Craft, 237 U. S. 648, 661;
Missouri Pacific R. R. Co. v. Bushey, 20 S. W. (2) 614, 618;
Luckenbach S. S. Co. v. Campbell, 8 Fed. (2) 223.

In St. Louis v. Craft (supra) this Court affirmed an award for $5,000.00 where decedent had suffered 30 minutes and in so doing it is to be noted as aforesaid that:

> "It involves only a question of fact and is not open to reconsideration here. Railroad Co. v. Fraloff, 100 U. S. 24, 31; The Justices v. Murray, 9 Wall. 274; Erie R. R. v. Winter, 143 U. S. 60, 75; Herencia v. Guzman, 219 U. S. 44; Southern Railway v. Bennett, 233 U. S. 80. Judgment affirmed."

As petitioner had conceded to this Court that the Trial Court correctly charged the jury, this case then simply involves the failure of petitioner to provide decedent with a seaworthy vessel, proper gear, and petitioner's negligence under the Jones Act (Title 46, Section 688, U. S. C. A.) and Railway Servants' Act. It is to be noted at the outset that on the question involved the Trial Court found:

> "that an issue was raised for the consideration of the jury and that the facts sufficiently sustained the verdict rendered" (R., 413).

Three Courts have fully considered the subject matter and law applicable and all have found in the affirmative. Their conclusion that the evidence was sufficient to sustain the judgment is in harmony with the statutes and decisions on the subject. Nothing more than well settled principles of law to the facts proven is involved.

Jurisdiction.

The petitioner invokes the jurisdiction of this Court under Section 240 (a) of the Judicial Code (as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938; U. S. C. A., Title 28, Section 347 [a]) and seeks by certiorari to review a State Court judgment, but

petitioner has failed to show that jurisdiction may be entertained under the provisions of said act. Petitioner's Statement of Jurisdiction (p. 5) concedes:

> "*The court correctly charged the jury* by reading to it the applicable sections of the Jones Act and Title 45, Section 51, United States Code Annotated, *and admonished the jury to be very careful* to remember the statutes upon which the action was based." (Italics ours.)

There was not raised during the course of the trial, and the record is lacking that the question sought to be reviewed now under Point I of petitioner's brief was presented to the Trial Court and raised by it during the trial. Further we say that there is no statement or evidence in the record that petitioner presented to the Court of Appeals of the State of New York for determination, a federal question and that its decision of the federal question was necessary to the determination of the cause. There is no report of an opinion by any of the Appellate Courts, for no opinion was rendered by them.

As part of its basis for jurisdiction petitioner refers to and quotes a part of one of respondent's briefs in one of the Appellate Courts. The quotation is not only incomplete but the record negates the incomplete and misquoted statement of petitioner, as set forth in its Statement as to Jurisdiction (p. 5). We submit that the record alone should be relied on as the basis for jurisdiction of the petition to this Court.

Petitioner has also endeavored to induce this Court to review proven facts as found by the jury and matters exclusively of state procedure, although it has been consistently held that such questions will not be reviewed:

Smiley v. Kansas, 196 U. S. 447;
Israel v. Arthur, 152 U. S. 355;
Brinkmeier v. Mo. Pac. Rwy. Co., 224 U. S. 268;
St. Louis R. R. Co. v. Craft (supra).

In *Smiley* v. *Kansas,* 196 U. S. 447, at page 453, the rule was stated to be:

> "The verdict of the jury settles all questions of fact. In Missouri, Kansas &c. Ry. Co. v. Haber, 169 U. S. 613, 639, it is said: 'Much was said at the bar about the finding of the jury being against the evidence. We cannot enter upon such an inquiry. The facts must be taken as found by the jury, and this court can only consider whether the statute, as interpreted to the jury, was in violation of the Federal Constitution. Chicago, Burlington & Quincy Railroad v. Chicago, 166 U. S. 226, 242, 246.' "

In *Israel* v. *Arthur,* 152 U. S. 355, at page 362, this Court held:

> "And it has been often held, at least in actions at law, that this court has no jurisdiction to revise the decision of the highest court of a state upon a pure question of fact, although a Federal question might arise if the question of fact were decided in a particular way. Dower v. Richards, 151 U. S. 658, and cases cited. * * * Writ of error dismissed."

And in *Brinkmeier* v. *Mo. Pac. Ry. Co.,* 224 U. S. 268, at page 270, the rule was stated to be:

> "Error is assigned upon this ruling; but as it involved only a question of pleading and practice under the laws of the State, it is not subject to review by us. Texas & New Orleans, R. R. Co. v. Miller, 221 U. S. 408, 416.
>
> It also was held that the evidence produced upon the third trial was not sufficient to sustain a recovery under the petition, and error is assigned upon this. As the petition did not state a cause of action under the Safety Appliance Act, but at most a right of recovery at com-

mon law, the ruling upon the sufficiency of the evidence did not involve a Federal question, and so is not open to reexamination in this court.

Finding no error in the record in respect of any Federal right, the judgment must be affirmed."

Petitioner did not present to the Trial Court the argument advanced here. There is lacking in the record the presentation of a federal question for decision to the highest Court of the State. The following authorities indicate that the petition should be denied.

In *Lynch et al., State Tax Com'rs, of New York* v. *People of New York ex rel. Pierson,* 293 U. S. 52, at pages 54, 55, it was held:

"It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment is rendered could not have been given without deciding it. (Citing cases.)

* * * * * *

As the record fails to show jurisdiction in this Court, the writ of certiorari is dismissed as improvidently granted.

Dismissed."

In *Honeyman* v. *Hanan,* 300 U. S. 14, 18, this Court stated:

"Before we may undertake to review a decision of the court of a State it must appear affirmatively from the record, not only that the federal question was pre-

sented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause. Lynch v. New York ex rel. Pierson, 293 U. S. 52, 54, and cases there cited. Whether these requirements have been met is itself a federal question. As this Court must decide whether it has jurisdiction in a particular case, this Court must determine whether the federal question was necessarily passed upon by the state court. That determination must rest upon an examination of the record."

Reply to Petitioner's Argument.

The petitioner's assertion that there were no facts to sustain the judgment as required by Sections 51-59, Title 45, U. S., is not supported by the record nor do the cases cited support its argument. An analysis thereof follows:

In the case of New Orleans R. R. Co. v. Harris, 247 U. S. 367, 372, the mother sued, and her complaint contained no reference to his widow who was alive at the time of trial, and had neither remarried nor divorced. There was no child, and the Court (with which we agree), held:

"The act makes the widow sole beneficiary when there is no child and only in the absence of both, may parents be considered."

There is no comparison between the cases. The recovery, this Court said, must be made under the federal act, as was done in our case, not under the state act as the plaintiff in the Harris case tried to do.

In Sabine Towing v. Brennan, 85 Fed. (2) 478, the Fifth Circuit Court of Appeals in a long and detailed opinion after stating at page 481 that "The law is well settled", held at page 484:

> "There is no doubt that the cause of action abated with the death of the mother, who at the time of her son's death was the *sole beneficiary* entitled to recover, to the exclusion of all others." (Italics ours.)

In the case at bar the sole dependent relative appeared and testified (R., 136 to 142). There has therefore been no abatement as there was in Brennan's case.

In Beebe v. Mooremack Gulf Lines, 59 Fed. (2) 319, Harrison H. Knighton, an employee, was survived by a wife, child and mother. A Marion Beebe, with whom some weeks before his death he had gone through a marriage ceremony, claimed damages. The employer had settled the case with the mother, wife and child. Beebe was not recognized, because as the Court said, there can be but one recovery, and that recovery may be only had by the lawful wife, there being but one widow, namely, the first wife. It held in denying Beebe damages:

> "The statute speaks of the surviving widow as though there could be but one. She who was the decedent's lawful wife at the time of his death is his widow. Polygamy is a crime under the laws of the United States. * * *
>
> We feel sure that Congress did not contemplate the possibility of a man leaving two lawful wives, or holding an employer to compensate two women claiming to be such."

Petitioner's contention that Frye, being an officer of the vessel, assumed the risk of the *defective equipment* and that it was not therefore responsible either for the unseaworthiness of the vessel and its equipment or the acts of his fellow crew members and the master is erroneous. The fact is that though Frye was chief mate he was a "sea-

man'' and entitled to all the benefits of laws enacted for their protection. Petitioner's responsibility and duty to him was no less in degree than its duty to the lowest ranking man on the vessel.

Warner v. Goltra, 293 U. S. 155.

It was there held that even the master of the vessel, was a seaman within the meaning of the Jones Act.

In Arizona v. Anelich, 298 U. S. 110, at 123, this Court said:

> ''Its (the Jones Act) purpose was to enlarge that protection, not to narrow it. Cf. Chelentis v. Luckenbach S. S. Co., supra. Its provisions, like others of the Merchant Marine Act, of which it is a part, are to be liberally construed to attain that end, citing cases.''

Concerning the case of DeLuca v. Shepard S. S. Co., 65 Fed. (2) 566, opinion modified, 67 Fed. (2) 437, cert. denied, 291 U. S. 685, on which petitioner places great stress and reliance, there are several important factors that distinguish it from ours. DeLuca was not a seaman, but Frye was. DeLuca's case was a third party action, this was not—this is a case of master and servant, DeLuca's was not. In the DeLuca case the Court found:

> ''There was no defect in the cable furnished by the defendant * * *'' (p. 438).

As pointed out above, Captain Seay admitted the brake band was broken and that it was not repaired. The jury's verdict and the affirmances negate a finding such as was made in DeLuca's case. Petitioner's contention that it was not negligent or that its vessel was without defects is thus satisfactorily refuted. Furthermore DeLuca as a shore worker was free to leave his employment, Frye was not.

Frye was in foreign waters and required to obey the orders of the ship's master.

Panama v. Johnson, 289 Fed. 964. The injured seaman was also in foreign waters. At page 979 it was held:

> "It is the duty of seamen to remain with the ship and to act in obedience to the commands of the master. Disobedience of orders by a seaman may involve him in serious consequences and subject him to possible forfeiture of wages previously earned and to imprisonment by the master. * * *
>
> "A master of a vessel has authority to enforce discipline on his ship and to compel the obedience of seamen and may inflict corporal punishment upon them."

This was the case in which the constitutionality of the Jones Act was argued and sustained (Panama v. Johnson, 264 U. S. 375).

The St. Louis v. Simpson case, 286 U. S. 346, relied upon by petitioner is distinguishable from the case at bar, and is therefore not applicable. It appears the claimant Simpson:

> "rests her right to recover upon what is characterized as the doctrine of 'the last clear chance' " (p. 349).

We did not recover on this ground and have never so claimed. This Court found in the Simpson case that the casualty was due to the decedent's sole negligence. The jury made no such finding in our case. In that case there was no claim of defective equipment or gear. In our case it was proven the brakes were broken and could have been repaired long before Frye was injured, but were not.

New York Central v. Marconi, 281 U. S. 345, is not helpful to petitioner. In affirming a plaintiff's recovery, had by a widow, at page 349 this Court said:

> "We think that there was sufficient evidence of petitioner's negligence to take the case to the jury."

And at page 350:

> "On the evidence it was for the jury to say whether petitioner exercised due care in moving the engine without a more specific and effective warning and whether failure to give it was the cause of the death.
>
> The jury, having found, as it might, that the negligence was the cause of the death, might also have inferred that the deceased was guilty of contributory negligence, but the trial judge correctly charged that under the Federal Employers' Liability Act contributory negligence is not a bar to recovery unless it is the sole cause of the injury or death, and may be taken into consideration by the jury in fixing the amount of damage."

No claim has been made in the case at bar that the Court did not properly charge the jury about contributory negligence. In fact, petitioner has admitted that the Trial Court made a correct charge (p. 5, Statement as to Jurisdiction).

This Court very recently defined the rule with regard to the responsibility of owners for the unseaworthiness of their vessels and the comparative negligence, if any, of the injured seaman.

> "We think that the consistent development of the maritime law in conformity to its traditional policy of affording adequate protection to seamen through an exaction of a high degree of responsibility of owners for the seaworthiness of vessels and the safety of their appliances will be best served by applying the rule of comparative negligence rather than that of assumption of risk, to the seaman who makes use of a defective appliances knowing that a safe one is available. The power of the trial judge to guide and instruct the jury

and his control over excessive verdicts afford as adequate a protection to owners as in any other case where the negligence of the seaman, whatever its degree, has contributed to an actionable injury."

Socony-Vacuum v. Smith, 305 U. S. 424, 432.

Baltimore & Carolina Line, Inc. v. Redman, 295 U. S. 654, also relied on by petitioner is not applicable herein.

In that case, the Trial Court reserved its decision on the motion to dismiss the complaint, until after the jury returned its verdict, but the Trial Court in case at bar ruled on petitioner's motions before submitting the issues to the jury, making no reservations (R., 337, 338).

And what is more important in the Redman case, with which this Court agreed, the Circuit Court (70 Fed. [2] 635) made this finding:

> "We have examined the entire record with care and *are convinced that the evidence is insufficient to support the verdict.* * * * When the only testimony for a plaintiff is *contrary to physical facts proven without contradiction,* the verdict for the plaintiff should be set aside" (p. 637). (Italics ours.)

In our case the Trial Court, with which the appellate Courts unanimously agreed, found that "the facts sufficiently sustain the verdict" (R., 413, 421, 428, 436).

It is submitted that, the principles of law applicable herein being settled, that further litigation in this matter is no longer warranted and the petition for a writ of certiorari should be denied.

Dated: May 28, 1941.

Respectfully submitted,

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